

Que (Migration) [2018] AATA 2173 (16 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Shibin QUE

CASE NUMBER: 1615053

DIBP REFERENCE(S): BCC2014/3412509

MEMBER: Shane Lucas

DATE: 16 May 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations.

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- Statement made on 16 May 2018 at 10:48am

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CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Joint finances – Joint household responsibilities – Relationship represented to others – Significant emotional support provided – Relationship viewed as ongoing and long-term – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 820.211(2)(a), 820.221

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 13 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a Chinese national born on 15 February 1984. He applied for the visa on 12 December 2014 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cls.820.211(2)(a), and consequently 820.221, of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant was the spouse of the sponsor. The delegate considered that the evidence and information provided in support of the application was not sufficient to demonstrate that the visa applicant satisfied the definition of spouse under s.5F of the Act.
3. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 19 April 2018 and 1 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. An additional seven witnesses made themselves available to provide evidence to the Tribunal. Two of these witnesses provided Statutory Declarations prior to the hearing attesting to the genuine and continuing nature of the relationship between the sponsor and the visa applicant. The Tribunal determined therefore that it was not necessary to take oral evidence from these witnesses.
5. The applicant was represented in relation to the review by a registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

7. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Regulations.
8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made (and at the time of decision) the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the spouse of the sponsor. The parties provided documentation attesting that the sponsor (born in Guangzhou, China on 22 July 1983) became an Australian permanent resident on 12 April 2011. Accordingly, the sponsor satisfies the requirements of cls.820.211(2)(b) and 820.221.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This

includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided the Tribunal with a certified copy of a Certificate of Marriage showing the marriage was made at Southbank, Victoria on 4 October 2014. There is nothing to suggest the marriage is not valid. The Tribunal is therefore satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

11. Are the other requirements for a spousal relationship met?

12. The applicant provided documentation to the Tribunal that was not available to the delegate. The Tribunal also had the benefit of hearing oral evidence from the applicant and the sponsor, and found both parties to be frank and credible.

13. Financial aspects of the relationship

14. The applicant provided the Tribunal with documentation attesting to the couple's financial arrangements. The material included but was not limited to documentation attesting to the couple's joint account with the National Australia Bank; mortgage accounts with ANZ Bank and Westpac in the name of the sponsor regarding the couple's investment properties in Hawthorn East, Victoria and Braybrook, Victoria; utility bills in joint or individual names (and/or in the name of the sponsor's mother, who owns and shares the couple's home in Springvale, Victoria) regarding their place of residence; Australian Taxation Office documentation for both parties; and body corporate and municipal rates documentation regarding the couple's investment properties.
15. The Tribunal also received documentation addressed to the parties in joint or individual names from a fertility specialist, the Melbourne IVF clinic, the Melbourne City Medical Centre, Epworth Pathology, Virtus Diagnostics, and Melbourne Pathology attesting to the couple's ongoing efforts (commenced in February 2016) to conceive a child through the in vitro fertilisation (IVF) program. The couple gave frank and credible evidence regarding their involvement in the program, which has been forced upon them due to the review applicant's low sperm count, an issue he first became aware of due to the similar experiences of his identical twin brother.
16. The Tribunal also received oral evidence from the applicant and sponsor regarding the approach the couple take to sharing their salaries, acquitting their weekly household expenses and making the mortgage repayments on their investment properties in Hawthorn East and Braybrook. The sponsor advised the Tribunal that she purchased the Braybrook property in 2013 prior to her marriage and that the review applicant did not contribute to the deposit on that property. The sponsor provided documentation attesting that the Hawthorn East property was purchased in 2015 and stated that the review applicant contributed some AUD 60,000 to the principal. In response to a question from the Tribunal, the applicant stated that his name is not on the title of this property as he is not an Australian permanent resident or citizen, and the couple wished to avoid the high cost of stamp duty on property purchases by foreign investors.
17. On consideration of the evidence, the Tribunal finds that the couple have pooled their financial resources in relation to the sharing of day-to-day household expenses and the joint ownership of real estate, being the couple's investment property in Hawthorn East. The Tribunal finds that the parties have joint liabilities and owe legal obligations in respect of

each other through their joint contributions to the purchase of the property, their shared responsibility for making the monthly mortgage repayments on both the Hawthorn East and Braybrook properties, and their shared commitment to the IVF program, which has thus far performed several embryo collections from the sponsor for the purpose of fertilisation by sperm taken from the review applicant.

18. The Tribunal is therefore satisfied that the financial aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.

19. Nature of the household

20. The applicant and sponsor gave consistent and detailed oral evidence about their daily living arrangements, including their work and recreational routines, their focus on the onerous IVF treatment being undertaken by the sponsor, and their extant household arrangements in the Springvale home owned by the sponsor's mother. The sponsor stated that her mother is an Australian permanent resident and spends approximately six months of each year in China, and the other six months with the parties at their shared home.
21. On the basis of the evidence before it, the Tribunal is satisfied that the couple live together and share responsibility for the housework, cooking and other domestic duties. The Tribunal is satisfied that the parties have established a joint household. The Tribunal found no evidence of any joint responsibility for the care and support of children, but acknowledges the expensive and emotionally taxing steps the couple is taking to conceive a child through the IVF program.
22. The Tribunal is satisfied that the nature of the parties' household attests to the genuine and continuing spousal relationship between the parties.

23. Social aspects of the relationship

24. The Tribunal considered statutory declarations and letters of support from third parties concerning the genuine and continuing nature of the couple's relationship, and notes also the preparedness of various members of the couple's family and friendship network to provide additional evidence to the Tribunal in support of this application. The Tribunal also received photographic evidence attesting to the couple's social life with a network of friends in Australia, and their interactions with family members. The applicant and sponsor also provided detailed and credible oral evidence regarding their respective family's support for their relationship, including during a return visit to China in July-August 2015 at which time the parties held a wedding banquet with family and friends to celebrate their marriage in Australia in October 2014.
25. The Tribunal also notes written statements provided by the couple's fertility specialists at Melbourne IVF and the Melbourne City Medical Centre in which the respective specialists confirm that the couple have been undergoing fertility treatment, and in which both professionals refer to the parties as husband and wife.
26. On the basis of the evidence, the Tribunal is satisfied that the persons represent themselves to others as being married to each other, and that the couple plan and undertake joint social activities. The Tribunal is also satisfied that the relationship is viewed as genuine and continuing in the opinion of the couple's family members, friends and acquaintances.
27. The Tribunal is satisfied that the social aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.

28. Nature of the person's commitment to each other

29. The parties first met in primary school in Guangzhou, China in approximately 1990. In a written statement, the review applicant states that the couple attended junior and senior high school together, and continued to maintain contact after graduating. The sponsor travelled to Australia in November 2004 on a Student Visa, but the parties continued to talk online intermittently. Throughout the early years of their relationship, both parties claim that they were friends and were not romantically involved at this time.
30. The sponsor returned to China in July 2012 to attend a mutual friend's wedding, and the review applicant claims that it was at this time that the nature of the parties' relationship changed. The review applicant stated that he gave the sponsor a gift on her departure for Australia on 24 July 2012, and that he expressed his romantic feelings for her. Though initially taken aback, the sponsor stated that she expressed her own feelings for the review applicant shortly before she departed again for Australia.
31. The relationship between the parties continued to evolve from that time, initially by telephone and through social media platforms. The review applicant stated that the couple were first physically intimate with each other in September 2013, during a visit to China by the sponsor. The review applicant also stated that the couple began living together at this time in the sponsor's parent's home, and that he continued to regularly visit the sponsor's parents and her other family members even after the sponsor's return to Australia on 23 September 2013. The couple became officially engaged in July 2014 and travelled to Macau briefly to jointly purchase wedding rings and the sponsor's wedding dress. The sponsor returned to Australia on 23 July 2014 and the review applicant arrived in Australia on 27 September 2014 on a tourist visa. The couple were married at Southbank on 4 October 2014. The couple have resided continuously at their Springvale home since their marriage and travelled to China together in July-August 2015 to spend time with their families and hold a wedding celebration.
32. The couple provided the Tribunal with frank and credible oral evidence regarding their relationship, demonstrating substantial knowledge about each other's personal histories, habits, character, family arrangements, current circumstances and future aspirations. The couple gave credible evidence regarding the development of their relationship over some 28 years; first as young children meeting in primary school; over the course of a long friendship; and since July 2012 as persons in a genuine and continuing relationship.
33. In response to questions from the Tribunal, the review applicant spoke with some emotion in describing his concerns for the sponsor's physical and psychological health should the couple continue to be unsuccessful in conceiving a child through the IVF program. In simple terms, the review applicant believes they should "give up" if unsuccessful as the treatment upsets the sponsor very much. The sponsor however wants to persevere, but also acknowledged the emotional toll the treatment takes on her. In this regard, the parties also spoke of their plans for the future. If they are able to conceive a child, they intend to move to a different part of Melbourne so as to access better quality schools; if they are unsuccessful, they intend to save money and travel to Canada and the United States.
34. On consideration of the evidence, the Tribunal is satisfied regarding the duration of the relationship and the length of time the couple have lived together (and not lived separately and apart) since their marriage in October 2014. The Tribunal is also satisfied that the persons draw on each other for a significant degree of companionship and emotional support, and that they view their relationship as a long term one.
35. The Tribunal is satisfied that the nature of the persons' commitment to each other attests to the genuine and continuing spousal relationship between the parties.

36. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied the applicant and the sponsor live together. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cls.820.211(2)(a) and 820.221.

Conclusion

37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

38. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).